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In The

# Supreme Court of the United States

October Term, 1975

No. 75-1906

ROBERT J. HENDERSON, Superintendent of Auburn Correctional Facility,

*Petitioner,*

*vs.*

BARRY WARREN KIBBE

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## Brief of the Monroe County, New York, District Attorney as Amicus Curiae

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The District Attorney of Monroe County, New York files this brief as *amicus curiae* pursuant to United States Supreme Court Rule 42 (4), as chief county legal officer for criminal matters.

### Opinions and Orders Below

The judgment of the Court of Appeals granting the writ of *habeas corpus*, the order denying rehearing, the order denying rehearing *en banc* and the decision and order of the District Court for the Northern District of New York are not reported, and are in the appendix filed by the Attorney General of New

York, counsel for petitioner. The decision of the New York Court of Appeals is reported in 35 N.Y. 2d 407, 321 N.E. 2d 773, 362 N.Y.S. 2d 848 (1974), and the decision of the intermediate state appellate court is reported in 41 A.D. 2d 228, 342 N.Y.S. 2d 386 (1973), each sub nom *People vs. Kibbe.*

## Jurisdiction

This Court has jurisdiction pursuant to Title 28 U.S.C. §1254 (1). The Court of Appeals judgment reversing the District Court for the Northern District of New York was entered April 8, 1976. The petition for rehearing and rehearing en banc were each denied by the Court of Appeals on May 21, 1976.

## Questions Presented

1. May a defendant who does not object to the charge to the jury and who does not raise the issue on appeal nevertheless attack its sufficiency in federal *habeas corpus*?

2. May the sufficiency of a charge to the jury in a state criminal prosecution be reviewed in isolation by a federal court to determine if the defendant was accorded due process?

3. Where a state jury in a criminal case is presented with each element of the offenses alleged, is a federal due process issue raised on grounds the charge was not detailed enough?

## Statement of The Case

The facts are set out in detail in the petition of the Attorney General of New York. We include this, somewhat shorter version, for continuity and clarity.

Barry Kibbe and his co-defendant picked up their victim, Stafford, in a bar and offered to drive him home after they had seen him flash a roll of over two hundred dollars. He was



concededly drunk when the trip to his house commenced. They soon turned down a remote county road, robbed him, and left him on the side of the road.

It was a cold winter night, temperature about 4 degrees farenheit. It had snowed, but the roadway had been plowed, and the excess snow formed snowbanks along the sides of the road. A few minutes later, a motorist, returning home, saw Stafford sitting in the roadway. The motorist couldn't react, and struck him. Stafford died that night in the hospital.

It later developed that Stafford's eyeglasses, his coat and his shoes had been removed by defendants and not returned when he was ejected from the car.

Defendants were indicted under New York Penal Law §125.25 (as effective in 1971), which makes it murder when:

> "* * * 2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of a death to another person and thereby causes the death of another person; * * *"

There was no objection to the judge's charge at the conclusion of the case, and the issue of causation was not raised on direct appeal to the state's intermediate appellate court (appellate division of supreme court). The conviction was affirmed, but one judge dissented on grounds the charge did not sufficiently define or explain causation. The Court of Appeals affirmed unanimously, but said the charge could have been more detailed.

Kibbe's subsequent habeas corpus petition was denied by the district court for the northern district of New York. On appeal, the second circuit court of appeals reversed, and granted the writ (one judge dissenting).

Because we have filed this brief without seeing the petitioner's appendix we were not able to make specific references to the

appendix. However, we understand the entire transcript will be before the Court and we hope our general references will not burden the Court.

## POINT I

**By Failing To Object To The Sufficiency Of The Jury Charge At Trial, Defendant Below Waived The Right To Raise It On Habeas Corpus.**

At the conclusion of the state trial, the judge charged the jury on the various aspects of the case, and gave a detailed breakdown of the particular penal statute (Penal Law §125.25). However, he did not specifically define the words "thereby causes" from that statute.

There was no objection to the charge or any requests on that point. The jury subsequently returned for questions, but never asked any question relating to causation.

On appeal from the guilty verdict, defendant did not raise the causation issue either. One judge in the intermediate appellate court (appellate division of state supreme court) voted to reverse in the interests of justice pursuant to N.Y. C.P.L. §470.15-3 (c) because the charge deprived defendant of a fair trial.

In response, the four man majority said:

> "* * * While we agree with the dissenting Justice's statement that the trial court's charge respecting the cause of death was lacking in detail, we do not feel that a new trial should be granted. Appellants have not raised any question as to the sufficiency of the charge on these appeals and their attorneys took no exception and made no request respecting the cause of death at the trial.
>
> In our opinion the charge together with language of the statutes and indictment and the evidence were sufficient to inform the jury on this subject and reversal of the judgment is not required in the interest of justice. * * *" *People v. Kibbe*, 41 A.D.2d at 230.



New York's Court of Appeals also rejected the issue of the jury instruction because:

> "* * * Neither of the defendants took exception or made any request with respect to the charge * * *." *People v. Kibbe*, 35 N.Y. 2d at 413.

A majority of the U.S. court of appeals (second circuit) said the failure to object was not a deliberate by-pass of the state's procedures (slip opinion at 3086), and then held that the jury instruction was so defective as to deprive the defendant of due process.

We contend that defendant did by-pass the state's procedures, and habeas corpus relief should not be available to him.

It is now settled that the federal courts are the final arbiters of federal issues. However, the burden of raising such issue is on defendant in this case. As we were told in *Fay v. Noia*, 372 U.S. 391, discussion at 438, 83 S. Ct. at 848, the federal courts can deny habeas relief if the defendant deliberately fails to raise the federal issue in the state court.

In addition, the thrust of *Fay* was that state procedural rules which deprive a defendant of a right to test a federal issue are not binding on the federal courts if they are merely technical. See also, *Henry v. Mississippi*, 379 U.S. 433, 85 S. Ct. 564.

The state's requirement that the defendant make a timely objection is not merely technical. It is necessary so that corrective action can be taken immediately without the necessity of further proceedings or additional trials. This is not an unreasonable requirement. *Henry v. Mississippi*, 379 U.S. at 448, 85 S. Ct. at 567.

In *U.S. v. Indiviglio*, 352 F. 2d 276 (1965) the second circuit came to the same conclusion *en banc* (discussion at page 280).

The court below correctly pointed out that defendant hoped to convince the jury he didn't cause the victim's death (slip

opinion, at 3087-3089). The court then held that the failure to object was inadvertent and should not be considered a deliberate by-pass. We respectfully urge that reasoning begs the question. The due process issue could only arise if the jury never had the causation issue. Here, that issue was presented to them in the opening statements, the closing statements, and the reading of the statute (Penal law §125.25-2). If defendant thought the charge was deficient it was his burden to raise the issue, because that is when the due process claim arose, if at all — when the charge was given.

This was not a case such as *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, where the factual issues were decided on the wrong legal theory entirely. The charge in this case was correct, but incomplete. While this incompleteness might, in a rare case, deprive defendant of a federal right, we strongly urge that based on the authorities cited above, he has the burden of raising this issue in time for corrective action to be taken, which burden he hasn't met.

We recognize that even though defendant "by-passed" the state's procedures, this Court can still grant habeas relief if the state heard the issue on the merits. E.g. *Lefkowitz v. Newsome*, 420 U.S. fn. 9 at , 95 S. Ct. at 891.

In this case, although the state courts considered the jury instruction as a matter of state procedure, the due process issue was never considered. Each appellate court refused to consider the issue on the merits because defendant had not made timely objection. *People v. Kibbe*, 35 N.Y. 2d 407, discussion at 413-414, and *People v. Kibbe*, 41 A.D.2d 228, discussion at 230.

Defendant failed to raise this issue in time for the state to take corrective action, and he should not be allowed to raise it long after conviction.



## POINT II

### The Jury Charge Was Sufficient In The Circumstances Of The Case, And In Any Event, No Issue Of Constitutional Dimensions Was Raised By The Charge.

The New York Court of Appeals agreed with the intermediate state court that " * * * the charge might have been more detailed. * * * " *People v. Kibbe*, 35 N.Y. 2d at 414. This alone does not mean that the charge was so deficient as to raise due process claims. In *Kenion v. Gill*, 155 F.2d 176 (D.C. Cir., 1946), the court said at page 178:

> " * * * Mere errors in the charge however, do not constitute sufficient basis for grant of habeas corpus. The inadequacy prerequisite to that writ must consist of the omission of essentials to such an extent that the accused is denied a fair trial in the Constitutional sense. * * * "

Similarly, in *U.S. ex rel. Smith v. Montayne*, 505 F.2d 1355 (2d Cir., 1974) the court said at page 1359:

> " * * * Whether or not the jury charge under consideration here is reversible as a matter of state law, the alleged errors are not of constitutional dimension. Defendant received a full and fair hearing and the trial judge's charge did not deprive defendant of his fundamental right to due process of law. It should be noted in addition that defendant's counsel did not request a specific charge, nor did he make objection to the judge's charge on any of the points currently before this court. * * * "

This Court told us in *Cupp v. Naughton*, 414 U.S. 141, 94 S. Ct. 396 (1973) that a jury instruction cannot be viewed in isolation, but must be examined in context of the entire case. Discussion at 414 U.S. 146-147, 94 S. Ct. 400.

The accused here had a fair trial per the holdings of *Cupp* and *Kenion*, since it is clear from the entire charge as well as the opening and closing remarks of the parties what the issues were. In order to find a due process violation, the court of appeals had

to view the omission in isolation, in conflict with the instruction in *Cupp*.

If the trial is viewed as a whole, defendant had a fair trial and was deprived of no rights. The jury instruction was complete and correct except that the portion dealing with causation was not sufficiently detailed. This does not create *ipso facto* a due process violation. A different issue might have arisen if defendant had objected to the charge, and had his objection overruled. But this didn't happen.

If our argument under point one herein is not persuasive, and this Court reviews the case on the merits, we urge the Court reverse the court of appeals and reinstate the conviction because there is no Constitutional defect requiring reversal of the conviction.



## Conclusion

If the jury instruction is examined as a whole together with the openings of counsel, their closing remarks, and the other instruction given by the judge during the trial, it is clear that there was no due process violation.

In addition, by failing to make a timely objection to the charge, defendants prevented the court from taking corrective action. Since defendant never raised a due process issue in the state courts, the federal courts should not review that issue in habeas corpus, especially since the state courts also did not consider the due process issue.

Defendant had a fair trial, the jury understood the issues they were to decide, and the jury instruction did not give them any misinformation, or create any confusion as to their duty. The conviction should be reinstated.

Respectfully submitted,

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